(16)

No. 96-663

In the

Supreme Court of the United States

October Term, 1996

MARVIN KLEHR AND MARY KLEHR,

Petitioners,

v.

A.O. SMITH CORPORATION AND
A.O. SMITH HARVESTORE PRODUCTS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

Charles A. Bird
Counsel of Record
Bird and Jacobsen
305 Ironwood Square
300 Third Avenue SE
Rochester, MN 55904
(507) 282-1503

Mary R. Vasaly
Michael C. McCarthy
Of Counsel
Maslon Edelman Borman
& Brand,
a Professional Limited
Liability Partnership
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200

Malcolm McCune
Maddin, Miller, and McCune
300 James Robertson Parkway
Nashville, Tennessee 37201
(615) 254-8756
Counsel for Petitioners

1997 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

28 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

MISCELLANEOUS

INTRODUCTION

Respondents, A.O. Smith and A.O. Smith Harvestore Products, Inc. (collectively "AOSHPI"), offer no valid reason why a jury should not hear Petitioners' claim for the injuries they suffered as a result of AOSHPI's continuing pattern of RICO violations. Claiming that Marvin and Mary Klehr (the "Klehrs") were too slow to recognize that it was their silo and not their farming practices that caused their damages, AOSHPI advocates a statute of limitations accrual rule which it says should bar the Klehrs' claim. It bases its rule on "staleness" concerns even though its RICO violations continue and the passage of time has not impaired any necessary evidence. Rather than cut off the Klehrs' claim, this Court should adopt the "last predicate act" accrual rule used for criminal RICO violations (hereinafter, the "criminal" rule) because it is consistent with both the continuing nature of AOSHPI's RICO violation, upon which the Klehrs' claim is based, and Congress' objectives in enacting the RICO statute.

Even if this Court adopts a limited accrual rule which focuses on injuries caused by each individual predicate act rather than the RICO violation, a jury should consider whether the Klehrs "should have known" of their injuries. Contrary to AOSHPI's contention, the lower court committed fundamental legal error when it placed the burden of *dis*proving AOSHPI's limitations affirmative defense on the Klehrs. Because a jury could reasonably conclude that AOSHPI failed to prove that the Klehrs knew or should have known, before the end of the limitations period, that the "sealed" Harvestore silo was insidiously destroying their cattle, the Klehrs are entitled to try their claims.

In addition, even under AOSHPI's limited "injury-discovery" rule, the case must be remanded and the trial court instructed to consider whether AOSHPI's continuing acts of concealment prevented the Klehrs from discovering that AOSHPI's fraud caused new and accumulating injuries in subsequent years. Whether based of "separate accrual" or "fraudulent concealment," AOSHPI's continuing misrepresentations and other predicate acts tolled the statute of limitations until the Klehrs discovered their injury.

ARGUMENT

I. THE CRIMINAL ACCRUAL RULE PROMOTES RICO'S PURPOSES AND PROVIDES COURTS AND LITIGANTS WITH A CLEAR AND PREDICTABLE STANDARD.

In its eagerness to have the Court adopt an accrual rule favoring RICO defendants, AOSHPI emphasizes the ease of borrowing a "traditional"[1] rule. But tailoring an accrual rule to advance specific Congressional policies and reflect the unique characteristics of a federal claim, such as RICO, poses no great difficulty. Accordingly, this Court has in the past resisted similar invitations from advocates of mechanical approaches to statute of limitations questions. *See Urie v. Thompson*, 337 U.S. 163, 169 (1949) ("mechanical analysis of the 'accrual' of petitioner's injury . . . can only serve to thwart the congressional purpose"); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 557-58 (1974) (proper test is whether proposed rule "in a given context is consonant with the legislative scheme"); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317-18 (1965) (resolution of statute of limitations issue should be based on Congress' basic policy objectives in enacting the law). Indeed, in *Havens Realty Corp. v. Coleman*, this Court warned that to ignore the nature of the claim itself in determining an accrual rule "only undermines the broad remedial intent of Congress." 455 U.S. 363, 380 (1982) (holding that a last act rule applies to continuing violations of Fair Housing Act).[2]

---

[1]As noted in section I.B., the "injury-discovery" rule AOSHPI proposes is not the rule "traditionally" applied to injuries caused by pattern offenses. This rule is particularly ill-suited to RICO as it allows a RICO violator to escape liability for a portion of the harm his continuing criminal pattern acts cause.

[2]*Amici*, American Council of Life Insurance and American Honda Motor Company, Inc. ("Honda"), brush aside RICO policy and claims that Congress *intended* the statute of limitations to run from "injury." This argument is based on the flawed premise that this Court borrowed the Clayton Act limitations period in *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143

Not surprisingly, the rule AOSHPI proposes primarily promotes repose for RICO defendants and does little to further RICO's purposes. Its uneasy fit with the structure of RICO claims results in difficult practical application problems for both courts and litigants. Ultimately, this narrow rule does little to punish or deter long-term criminal enterprises, allowing them to absorb the impact of RICO claims as a cost of "doing business."

In contrast, the criminal accrual rule not only fulfills RICO's purposes, but serves the courts' and litigants' interests in adoption of a clear and certain limit to liability. Although AOSHPI argues that the criminal rule creates long-term exposure to RICO liability, this long-term exposure only reflects Congress' efforts to combat long-term criminal conduct and exists, under the criminal rule, only as long as criminal conduct persists. The criminal accrual rule not only reduces uncertainty; it is consistent with the continuing nature of RICO violations, promotes RICO's purposes by bringing the full weight of the civil claims associated with a criminal pattern to bear on a criminal enterprise, and fully compensates victims of criminal activities that continue into the limitations period.

A. Federal Courts Apply a "Last Act" Accrual Rule For Injuries Caused by Continuing Patterns or Practices.

Insofar as "tradition" has a role in choosing an appropriate accrual rule, following tradition here leads to adoption of the criminal rule. Although AOSHPI relies heavily on a "tradition" of commencing the statute of limitations from the date injury occurs, it eventually abandons its own argument. Based on a case decided not long after the Civil War, it first argues that allowing the statute of limitations to commence at some point other than "accrual"[3]

(1987), because it found that Congress *intended* that it do so. Honda Br. 4. As Justice Scalia pointed out in his dissent, this claim is untenable because, at the time RICO was enacted, the Court had never "borrowed" a Federal statute of limitations. *See* 483 U.S. at 167 & n.4 (Scalia, J., dissenting).

[3]Here the term "accrual" describes the point at which a claim first becomes viable. As AOSHPI notes, at one time the statute of limitations always commenced to run from that point. *See Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875). Courts now rely on policy to choose other crucial dates to serve as the point from which the statute of limitations should run.

would be exceptional. *See* Resp. Br. 11 (citing *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875)). Even AOSHPI acknowledges, however, that 125 years of progress have so changed the law that in modern times a variety of accrual rules exist. *See, e.g., United States v. Kubrick*, 444 U.S. 111, 122 (1979) (claim accrues when plaintiff knows of injury and its cause); *Urie*, 337 U.S. at 170 (statutes of limitation "conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights"). Among these rules is the federal "last act" rule, similar to the criminal rule proposed here, for claims based on continuing violations of a federal statute constituting a "pattern or practice" of unlawful conduct continuing into the limitations period. *See, e.g., Havens Realty*, 455 U.S. at 380; *Hukkanen v. International Union of Operating Eng'rs*, 3 F.3d 281, 285 (8th Cir. 1993) (statute of limitations on Title VII violation begins to run upon the last occurrence of discriminatory practice); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989) (commencing limitations at last act in pattern under Title VII is "a general principle" of our law); *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1129 (3d Cir. 1988); *Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir. 1982) (employment discrimination). As these cases demonstrate, consideration of "tradition" favors adoption of the criminal rule here.

1. The Criminal Rule Promotes the Interests of Legitimate Businesses.

AOSHPI contends that adoption of the criminal rule will harm legitimate businesses by exposing them to RICO claims. Congress' deliberate enactment of RICO so that "legitimate" businesses generating profits through patterns of criminal activity would be required to disgorge their "ill-gotten gains" makes AOSHPI's concern irrelevant. *United States v. Masters*, 924 F.2d 1362, 1369 (7th Cir.), *cert. denied*, 500 U.S. 919 (1991). By specifically including long-term patterns of mail and wire fraud, which

---

Although these dates are not technically dates of "accrual," the courts use the term "accrue" to refer to the time the court has decided, as a policy matter, that the statute of limitations should commence to run. *See, e.g., United States v. Kubrick*, 444 U.S. 111, 121-22 (1979).

AOSHPI and its *amici* term "garden variety" business conduct, within the reach of the statute, Congress directed that fraud should not constitute "business as usual" at American companies.[4] These operations not only provide funds to organized crime syndicates, but they also unfairly hurt legitimate businesses competing with wrongdoers. In this case, for example, AOSHPI's fraud harmed not only the Klehrs, but also manufacturers of other silos. Because RICO can help to eliminate such unfair competition, legitimate businesses should favor RICO not fear it. *See* Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 Minn. L. Rev. 827, 827-28 (1987) (observing that antitrust and securities laws which are today viewed as essential to maintaining free competition and marketplace integrity, were once, like RICO, opposed by the business community). The criminal accrual rule will, in the final analysis, benefit business.

2. The Nature of RICO Claims Favors Adoption of the Criminal Rule.

AOSHPI argues that the criminal rule does not "fit" civil RICO because a civil plaintiff must prove an additional element—injury—in order to recover. This argument is without merit because it is the existence of the "pattern" element—which both civil and criminal RICO share—which courts have uniformly held make the rule appropriate in the criminal context. *See United States v. Starrett*, 55 F.3d 1525, 1544 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1335 (1996). The arguments for repose and against staleness apply equally to criminal and civil defendants. Indeed, the potential for criminal liability is far more onerous than the potential for civil liability. Yet, courts have not felt it unjust that the statute of limitations for criminal RICO commences when criminal acts end. Moreover, the existence of continuing criminal

---

[4]RICO's definition of "enterprise" "include[s] both legitimate and illegitimate enterprises within its scope." *United States v. Turkette*, 452 U.S. 574, 580 (1981); *see* 18 U.S.C. § 1961(4). "Congress for cogent reasons chose to enact a general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989).

exposure suggests that a RICO defendant will shoulder no greater burden if he must respond to parallel civil claims.[5]

3. The Criminal Rule Is Consistent With Statute of Limitations Policies.

a. The Rule Does Not Promote Lengthy Limitations Periods.

Although AOSHPI complains that the criminal rule may expose defendants to suit for lengthy periods, the potential length of exposure to claims is a function of the statute itself, not the criminal accrual rule. Congress provided that the predicate acts in a pattern may be separated by as much as ten years. *See* 18 U.S.C. § 1961(5). Congress also defined "pattern" in a way that includes all related predicate acts regardless of the length of time they continue. Under the criminal accrual rule, however, a defendant may avoid long-term exposure simply by stopping further criminal activity, knowing that four years later, its liability will end.

The "injury-discovery" rule is more uncertain and open-ended than the criminal rule. Under the "injury-discovery" rule, a claim does not accrue until plaintiff discovers or ought to discover her injury and the claim may be equitably tolled until the plaintiff discovers or ought to discover the RICO pattern. Since all of the other predicate acts in the pattern may be directed against someone other than plaintiff, she may be unable to discover the facts constituting the pattern for many years, and certainly long after any wrong-doing has ceased. *Keystone*, 863 F.2d at 1132 (in multiple victim cases, each victim may be unaware for many years that her injury is part of a pattern rather than an isolated event). Under

[5]There is at least some evidence that Congress looks favorably on applying a uniform limitation period to civil and criminal claims. A 1995 amendment to RICO curtails securities violations as predicate acts, permitting claims based on securities violations only against a person convicted of securities fraud. The limitations period "start[s] to run *on the date on which the conviction becomes final.*" 18 U.S.C. § 1964(c) (emphasis added). Congress believes that civil plaintiffs with disfavored securities-based claims should, at the very least, be permitted to bring civil RICO claims after a criminal conviction. The Court should not deny the great majority of civil RICO plaintiffs the same opportunity to bring civil claims by adopting disparate civil and criminal accrual rules.

AOSHPI's rule, a defendant can be exposed to claims relating to wrongdoing that was abandoned many years earlier. Thus, a defendant's legitimate interest in certainty is better served by the criminal accrual rule than the "injury-discovery" rule.

b. The Criminal Rule Does Not Require the Court to Try "Stale" Claims.

The criminal accrual rule is consistent with underlying statute of limitations policies intended to protect defendants. Limitations periods are designed to prevent fraud where the lapse of time has destroyed or impaired evidence which would defeat the claim. *Exploration Co. v. United States*, 247 U.S. 435, 447 (1918). This "staleness concern disappears," however, where continuing violations are the basis of the action. *Havens Realty*, 455 U.S. at 380.

Similarly, the criminal rule does not violate limitations policies promoting repose. Repose is appropriate only in "compelling circumstances" where defendants have earned the right to put their earlier wrongdoing behind them. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). These compelling circumstances simply do not exist where wrongdoing continues. *See Taylor v. Meirick*, 712 F.2d 1112, 1118-19 (7th Cir. 1983).[6]

The facts of this case clearly illustrate why statute of limitations policies play no role in an action based on an ongoing RICO pattern. Here, AOSHPI has no real "staleness" concern; it has not pointed to a single fact which renders the Klehrs' claim "stale" or difficult to try in any respect. AOSHPI can claim no surprise; it tries similar claims on a continuing basis and has gathered such evidence as is available to defend itself from potential civil and punitive damages. *See, e.g., Kronebusch v. MVBA Harvestore Sys.*, 488 N.W.2d 490 (Minn. Ct. App. 1992).

[6]Where there is actual prejudice from a plaintiff's delay in bringing suit, the court can apply equitable principles on a case by case basis to afford relief. *See Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 437 (1965) (Douglas, J., concurring) ("long-established federal rule of laches" is "uncomplicated, uniform, and directly responsive to the problem" of prejudice caused by plaintiff's delay in bringing suit); *see also Occidental Life Ins. Co. of Cal. v. E.E.O.C.*, 432 U.S. 355, 373 (1977).

Finally, AOSHPI, which continues to violate the Act, has not earned repose. In short, no policy underlying a statute of limitation is served by depriving the Klehrs of their right to try their RICO claim.

B. AOSHPI's "Injury-Discovery" Rule Is Inconsistent With RICO's Structure and Policy.

1. The "Injury-Discovery" Rule Is Not a Traditional Rule.

Although AOSHPI tries to wrap its "injury-discovery" rule in the cloak of tradition, its effort to mask the rule's novelty, particularly as applied to RICO, fails. First, AOSHPI ignores the continuing nature of RICO violations. As a result, it fails to note the cases that apply a different rule—a last act rule—where the injury is the result of a continuing pattern of violations of federal statute. *See, e.g., Havens Realty*, 455 U.S. at 380-81.

Second, unlike the criminal accrual rule, the "injury-discovery" rule defies tradition by dispensing with the discovery requirement for one of the core elements of the RICO claim: pattern. AOSHPI's novel approach to the statute of limitations starts the limitations period running before a plaintiff has sufficient information about the claim.[7] Thus, the rule encourages, indeed requires, a plaintiff to commence an action without the necessary facts, increasing the likelihood that the plaintiff's claim may fail to meet Rule 9 pleading requirements or that the plaintiff's action will be settled before she has even discovered her RICO claim.

AOSHPI's rule has an even more troubling defect: it creates a point of accrual that may be undeterminable. Under the rule, a party may have no RICO claim at the time he learns of his injury because the defendant's other predicate acts may not yet form a pattern. That party's claim later springs to life, according to AOSHPI, when the RICO pattern element has been developed. Because a pattern, by definition, is a series of related acts, however,

[7]AOSHPI's suggestion that equitable tolling should stand in for discovery of the pattern element does not soften the harsh effect of its rule. If substituting a tolling rule for discovery of the facts of the claim were fair, the court would substitute tolling for the discovery rule in every case. *Cf. Urie*, 337 U.S. at 169-71.

the pattern must necessarily *first* arise with the first act in the series. If plaintiff is injured by that first act, the limitation period under AOSHPI's injury-discovery rule will run from discovery of the injury and plaintiff's claim may be barred before it can be brought. *See Keystone*, 863 F.2d at 1134.

It does not solve this problem to say that the limitations period will run for such plaintiffs from the time of the second, third or any other arbitrary predicate act in the pattern. This will only place "accrual" at some nebulous point over the course of the pattern that is, by its very nature, undefinable. In later litigation over the timeliness of the claim, the defendant will always claim that the pattern was born with the second act, and the plaintiff will claim that the pattern was born when defendant committed some later predicate act. A court will be unable to resolve this controversy on a principled basis because predicate acts do not "become" patterns at the time defendant commits any particular act in the pattern. *Cf. H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989). Thus, under this interpretation of AOSHPI's rule, there will be no discrete point from which the four-year limitations period will run. This fundamental inconsistency illustrates the ill fit between AOSHPI's injury-discovery rule and RICO's structure.

2. The "Injury Discovery" Rule is Inconsistent With RICO's Purpose To Eradicate Pattern Crime.

AOSHPI's "injury-discovery" rule also interferes with RICO's effectiveness against pattern crime because it dilutes a RICO defendant's exposure to damages.[8] RICO's powerful measures are intended to attack racketeers who "'drain[] billions of dollars from America's economy by unlawful conduct and the illegal use of force, *fraud*, and corruption.'" *United States v. Turkette*, 452 U.S. 574, 588 (1981) (quoting 84 Stat. 922 (emphasis added)). As the Senate Report on RICO noted: "an attack must be made on their source of economic power itself, and the attack must take place on

[8]*See also* 116 Cong. Rec. 35199 (1970) (remarks of Rep. Rodino) ("a truly full-scale commitment to destroy the insidious power of organized crime groups"); *id.* at 35300 (remarks of Rep. Mayne) (organized crime "must be sternly and irrevocably eradicated").

all available fronts." S. Rep. No. 91-617, at 79 (1969). The aim of RICO's civil remedies is to "divest the association of the fruits of its ill-gotten gains." *Turkette*, 452 U.S. at 585.

AOSHPI asks this Court to adopt an accrual rule which will undermine RICO's tough measures by requiring RICO defendants to divest only a portion of their "ill-gotten gains" even if their criminal activity extends into the limitations period. Congress' objectives would be largely thwarted by a rule of accrual that permits RICO offenders to pocket profits from all but a small portion of a long-term scheme involving many victims. RICO would become a mere duplication of ineffective existing state remedies. Undermining the effectiveness of RICO's civil remedies would thereby create an incentive to commit fraud by making the expected penalty less than the anticipated gain. If criminal enterprises can limit their exposure as AOSHPI suggests, they would be able to plan for and adjust their liability as a cost of doing business. By weakening RICO's power to economically disrupt criminal enterprises, the "injury-discovery" rule would "chloroform"[9] RICO, rendering it ineffective against "legitimate" businesses and criminal enterprises alike.[10]

The dilution of RICO's civil remedies in the lower courts has allowed AOSHPI itself to absorb the impact of civil claims—even punitive damages—without seeming effect. Because farmers have been slow to realize they have been injured, due to the nature of the

[9]The then-future Justice Felix Frankfurter criticized Wall Street's reaction to New Deal securities legislation in such terms. Letter from Felix Frankfurter to Henry Stimson (Dec. 19, 1933), *reprinted in* Seligman, *The Transformation of Wall Street* 79 (1982).

[10] The suggestion that "legitimate" businesses have been harassed by "garden variety" claims dressed in RICO clothing is grossly exaggerated in any event. *See* Goldsmith, *supra*, at 839. Review of the claims that have been found to be time-barred under the existing narrow accrual rules confirms that they were not "garden variety" commercial claims. They involved serious criminal acts. *Id.* at 839 n.54. Moreover, just as the Court may not properly consider the fact that an appropriate accrual rule may bar some good claims, it may not properly consider the fact that an appropriate accrual rule may not bar some bad ones.

fraud and its concealment, AOSHPI has been able to continue reaping the profits from marketing its product, confident that it can absorb the cost of the lawsuits that are periodically filed against it. This Court should not assist AOSHPI in its effort to reduce RICO from a major weapon in the war on criminal organizations to a minor irritant on the road to ill-gotten gain. *Cf. Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993) (liberal construction clause "seeks to ensure that Congress' intent is not frustrated"); *Turkette*, 452 U.S. at 587 (the Court is without authority to restrict RICO).

C. This Court is Not Bound to "Borrow" Accrual Rules.

Relying on *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 362 n.8 (1991), *amici* Honda argues that having borrowed the Clayton Act's limitations period, this Court must adopt the Clayton Act "accrual" rule as well. *Lampf*, however, held only that a court must adopt any express limitations provision the statute of origin contains. *See id.* at 359. Furthermore, *Lampf* did not address the question of "accrual." This Court does not "borrow" accrual rules; it determines accrual based on its own evaluation of policy. *See, e.g., Urie*, 337 U.S. at 169-71 (tort claim under FELA accrues upon manifestation of injury).

In any event, the fundamental differences between RICO and the Clayton Act would necessarily lead to different conclusions about when claims under each statute "accrue." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (cautioning against "the hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.'"). Section 1964(c) provides that one who is injured "by reason of a violation of section 1962 may sue."[11] One does not violate § 1962(c) by committing a single predicate act. Rather, § 1962(c) makes it illegal to "conduct or participate . . . in the conduct of [an] enterprise's affairs through a *pattern* of racketeering activity." 18 U.S.C. § 1962(c) (emphasis added). Because RICO's focus on the pattern element as the core of the violation is different from the Clayton Act's focus on discrete

[11]"Logic and precedent dictate that the starting point in every case involving construction of a statute is the language itself." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (citation omitted).

violations, the meaning of "accrual" as applied to each claim is different. *See Keystone*, 863 F.2d at 1135. Accordingly, *amici's* argument, carried to its logical conclusion, leads to adoption of the criminal rule.

D. The Criminal Rule Has None of the Application Problems Which Characterize AOSHPI's Rule.

The criminal rule is superior to AOSHPI's rule because it may be consistently and predictably applied. The "injury discovery" rule is, in contrast, a prescription for litigation. In applying the "injury discovery" rule, courts must first determine when the plaintiff knew or should have known of her injury. In addition, the court must determine when the "pattern" first came into being. As noted above, this inquiry will frequently be unresolvable. Even then, if a plaintiff seeks the protection of the equitable tolling doctrine, the court will need to decide when a plaintiff "should have known" of the facts constituting the pattern. This will be difficult because there may be no perceptible "pattern" after the second act, or even the third or fourth. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) ("proof of two predicate acts of racketeering, without more, does not establish a pattern"). The parties will not know, until they have litigated these preliminary issues, whether the RICO claim on the merits will proceed. The creation of this collateral litigation is antithetical to the certainty a statute of limitations should create. *See Wilson*, 471 U.S. at 272.

Additional uncertainty surrounds adoption of the "separate accrual" rule which is a necessary component of the rule AOSHPI promotes. Multiple similar injuries, spread over time, frequently result from the very nature of a RICO violation. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989). The separate accrual rule, which theoretically answers the multiple injury question, is extremely complex and difficult for courts to apply. *See* Honda Br. 9-14.[12]

[12]AOSHPI argues that the Eighth Circuit properly applied the "traditional" separate accrual rule, which it claims requires as its basis an act committed within the limitations period. Resp. Br. 12-13. This formulation of the rule is patently inconsistent with the discovery rule AOSHPI proposes and the majority of courts have rejected it. *See, e.g., Bingham v.* Zolt, 66 F.3d 553 (2d

More importantly, requiring plaintiffs to bring multiple actions for recovery of damages for separate injuries caused by continuing pattern crime is wasteful and unnecessary. *Cf. Taylor*, 712 F.2d at 1118-19 (Posner, J.).

In contrast, the court's experience with application of the criminal rule has been uniformly successful; few criminal cases raise the statute of limitations issue. Indeed, one court called the "last predicate act" rule "the most trustworthy and predictable triggering rule . . . we have." *United States v. Vogt*, 910 F.2d 1184, 1197 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991). Because the criminal accrual rule provides clear and definite standards which reduce litigation, allows plaintiffs to avoid multiple actions, and resolves issues relating to pattern activity in a single action, it is the most practical rule for RICO litigation. In addition, it enhances RICO's effectiveness as a tool against the long-term pattern crime which drains "billions" from the economy and fully compensates victims of RICO violations. Accordingly, the Klehrs ask that the Court adopt the criminal rule and reverse the judgment below.

II. THE EIGHTH CIRCUIT IMPROPERLY RESOLVED A JURY ISSUE.

A. The Eighth Circuit Improperly Placed the Burden of Proof on the Klehrs.

If this Court were to adopt AOSHPI's narrow, injury-based rule, the question whether the rule was properly applied to the facts

Cir. 1995), *cert. denied*, 116 S. Ct. 1418 (1996). Instead, these courts hold that a claim accrues when a plaintiff discovers or should discover each new injury even if the act which caused the damage occurred outside the limitations period. Based on the separate accrual rule used by courts employing an "injury-discovery" accrual rule, later predicate acts must be included in the determination whether the Klehrs knew or should have known of the accumulating damage. Even under the Clayton Act rule, such continuing acts restart the limitations period. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968). That the damage was not qualitatively different in kind is not relevant if the damage was proximately caused, at least in part, by later predicate acts. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (common law principles of proximate cause apply to RICO claims).

in this case would remain. AOSHPI contends that the Eighth Circuit's recitation of the summary judgment standard somehow overcomes its clear error in placing the burden of disproving the statute of limitations affirmative defense on the Klehrs.[13] AOSHPI is mistaken. The court cannot properly apply the summary judgment standard without knowing which party bears the burden of proof on the issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (court must view the evidence "through the prism of the substantive evidentiary burden"). This is so because the evidentiary threshold for obtaining summary judgment differs based on which party bears the burden of proof. *See Celotex*, 477 U.S. at 325. Thus, the misapplication of the burden of proof at the summary judgment stage is a fundamental error which requires reversal.

B. The Klehrs' Failure to Discover That the Harvestore Damaged Their Feed Was Reasonable.

AOSHPI attempts to weave an argument from the irrelevant evidence that AOSHPI exaggerated the benefits of Harvestore ownership. AOSHPI even recharacterizes the Klehr's claim: at page 33 of its brief, it suggests that the Klehrs were required to prove that AOSHPI "defrauded" them by promising that the Harvestore would provide "specific benefits." Of course, none of this is relevant, as the Klehrs do not base their claims on mere disappointed expectations. *See* Jt. App. 13 (Amended Complaint).[14]

---

[13]AOSHPI argues that this Court should not disturb the "findings of fact" below. In the case it cites, *Exploration Co.*, 247 U.S. 435, the courts below had affirmed findings of fact after trial on the merits. In sharp contrast, the court in this case did not "find the facts" but ordered summary judgment against the Klehrs. Thus, review by this Court is de novo. *See Eastman Kodak, Inc. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992).

[14]AOSHPI cites to certain scientific studies, not in the record below, to support the contention, not made below, that Harvestore silos work as represented. *See* Resp. Br. 5 n.2. First, this claim is improperly based upon matters not part of the record. As such, it should be disregarded. *See, e.g., Whitecotton v. Secretary of Health and Human Servs.*, 81 F.3d 1099, 1105 (Fed. Cir. 1996) ("[w]e cannot incorporate scientific studies cited for the first time on this appeal into our review"). Second, numerous court decisions have

AOSHPI's misleading characterizations to the contrary, this is not a "garden variety" commercial warranty case. The Klehrs did not sue for breach of contact and are not seeking to recover based on the failure of the silo's represented "benefits." The Klehrs' claim is based on AOSHPI's violations of federal law which occurred when AOSHPI lied to the Klehrs and other farmers about the "oxygen-limiting" characteristics of the silo and that the silo would not damage the feed for the cows.[15] Like the plaintiff in *Kubrick*, the Klehrs never knew and could not know that the silo was slowly poisoning their cattle because they had no access to AOSHPI's secret research studies.[15] The statute of limitations should not begin to run on the Klehrs' RICO claim until the Klehrs learned what AOSHPI long knew—that the representation that Harvestore silos are oxygen-limiting was false.

III. AOSHPI'S FRAUDULENT CONCEALMENT ESTOPS IT FROM ASSERTING THE LIMITATIONS DEFENSE.

If the Court rejects the criminal accrual rule and concludes that, as a matter of law, the Klehrs should have known of AOSHPI's racketeering more than four years before they commenced this action, it must then determine whether, for purposes of estopping a defendant from asserting a limitations

---

found that Harvestore silos do not perform as represented. Third, these articles demonstrate AOSHPI's continuing proclivity to publish the good (and misleading) articles and hide the relevant internal research, making it impossible for farmers to learn the facts which constitute the basis for their claims.

[15]AOSHPI sets up several straw men in its argument on the facts. First, it claims that the Klehrs rely on the representation that the silo would eliminate mold. Resp. Br. 4, 27, 33. In fact, the Klehrs' claim is based on the representation that the silo would limit oxygen. Marvin Klehr believed, based on the salesman's representations, that the mold he saw was "insignificant" and did not suggest that the silo was not preserving the great bulk of "good" feed exactly as represented. Jt. App. 172-73 ¶ 4. Similarly, intermittent tests of the Klehrs' feed did not disclose the damage as the results, at those times, ranged within normal limits for protein loss caused by normal fermentation. *See* Record 102, Aff. of Charles Bird, Ex. M, at 2374, 2362, 2329. Finally, the unsupported claim that the Klehrs' milk production records made AOSHPI's fraud apparent is contradicted by the evidence. *See* Jt. App. 169.

defense, acts of fraudulent concealment are to be sanctioned as a means of preventing a victim from learning of his RICO action or whether, instead, such acts shall result in a separate, incremental extension of the limitations period until the victim actually learns of the defendant's wrongdoing. Because AOSHPI concealed its wrongdoing through affirmative acts, rather than through mere failure to disclose the truth, it should be estopped from asserting the limitations defense until the Klehrs learned what had been done to them.

A. This Court Has Not Addressed the Effect of Fraudulent Concealment on the Limitations Period.

AOSHPI contends that this issue has already been decided by this Court and that, in the alternative, the mere weight of federal appellate decisions that have refused to apply the "actual knowledge" standard dictate the result in this case. Neither contention is correct.

In *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874), this Court addressed the doctrine of fraudulent concealment, but did so in the context of a defendant's mere failure to disclose the details of a fraudulent conveyance (rather than in the context of affirmative acts of concealment). *See id.* at 343. Thus, "[t]he reference to diligence in *Bailey* . . . is to the plaintiff's discovering that he has a fraud claim," and not to post-fraud acts of concealment. *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1103 (7th Cir. 1992) (Posner, J., concurring). This Court again addressed the issue in *Wood v. Carpenter*, 101 U.S. (11 Otto) 135 (1879), but, as was explained in *Rosenthal v. Walker*, the *Wood* Court "was called on to construe a statute of limitations of the State of Indiana" rather than the federal doctrine of fraudulent concealment. 111 U.S. 185, 190-91 (1884). Accordingly, the next significant development occurred when the Court declared that the doctrine of fraudulent concealment is to be "read into every federal statute of limitations." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

Although several courts of appeals have held that the *Bailey-Holmberg* discovery doctrine, with its requirement of diligence on the part of the plaintiff, applies in all contexts—regardless of the attempts made by the defendant to prevent the victim from learning

of the defendant's wrongdoing—those courts have routinely reached their decisions with little or no analysis of the issue. The court that has undertaken the most serious analysis of the issue has held that acts of fraudulent concealment toll the limitations period until the victim *actually learns* of the defendant's wrongdoing. *See, e.g., Wolin v. Smith Barney Inc.*, 83 F.3d 847 (7th Cir. 1996). It is the Seventh Circuit's analysis, and the similar analysis provided by the Court of Appeals for the District of Columbia, *see, e.g., Riddell v. Riddell Wash. Corp.*, 866 F.2d 1480, 1491 (D.C. Cir. 1989), that this Court should look to in determining what effect deliberate acts of fraudulent concealment should have on the ability of a defendant to assert the limitations period as a defense.[16]

B. The Policy Underlying the Doctrine of Fraudulent Concealment Can Only Be Served by Application of the Actual Knowledge Standard.

Although AOSHPI is content to rest on a string citation and consequently omits any discussion of the arguments set forth by the Klehrs—which arguments rely principally on discussion of the issues contained in opinions by Chief Judge Posner and Judge Becker, *see* Pet. Br. 46-48—one of AOSHPI's supporting *amici* has addressed the issue. *See* Honda Br. 29. In sum, *amici* contend that defendants will be sufficiently deterred from engaging in deliberate acts of fraudulent concealment by the risk that such acts, if successful, will extend the period of time during which a victim will not be charged with constructive knowledge of the defendant's wrongdoing. *Amici's* position fails to stand up to careful analysis, and it errs in placing the focus on the conduct of the victim rather than on the deliberate efforts to conceal from the victim the defendant's wrongdoing.

---

[16] In *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979), the Second Circuit followed *Sperry v. Barggren*, 523 F.2d 708 (1975), in adopting the "actual knowledge" standard. AOSHPI contends that this case has been implicitly overruled, Resp. Br. 37 n.18, but no case overrules *Robertson*. At least one of the cases cited by AOSHPI suggests that there is now a split in authority in the Second Circuit, but, as the earliest of the cases to address the issue, *Robertson* controls. *See Lo Duca v. United States*, 93 F.3d 1100, 1105 (2d Cir.), *cert. denied*, 117 S. Ct. 508 (1996).

There are three possible results when a defendant deliberately conceals its wrongdoing: (1) the concealment may be entirely unsuccessful, (2) the concealment may be somewhat successful, in which case the victim learns of the wrongdoing at a later point in time than he would have if the defendant had not attempted the concealment, or (3) the concealment may be entirely successful, in which case the victim never learns of the defendant's wrongdoing. The position of *amici* addresses only the second of these three possibilities—which is, the Klehrs admit, what happened here. *Amici* contend that the tolling of the limitations period until the victims should have learned of the wrongdoing, taking into account the effect of the concealment,[17] is punishment enough. The analysis by *amici* ignores the circumstances in which the concealing wrongdoer either fails in its efforts to conceal or is entirely successful in preventing the victim (or victims) from learning of the wrongdoing.

It is these circumstances—and, most specifically, the circumstance in which the fraudulent concealment is successful—that the doctrine should be designed to address, for it is not the partially successful act of concealment that must be deterred (though it, too, must be deterred), but it is the *successful* act of concealment that the doctrine should seek to prevent. Although the doctrine cannot eliminate all such acts of concealment, if the cost of undertaking such acts—regardless of the degree of ultimate success—is sufficiently great, then defendants will think twice before undertaking to deliberately conceal their wrongdoing. If the only cost is the marginal extension of the limitations period during the time in which the concealment is considered successful, then the cost-benefit analysis (in which no cost is incurred either if the acts are entirely successful or if they are entirely unsuccessful) will often support concealment—for if the acts of concealment succeed entirely, the benefit is immeasurable.

The "actual knowledge" standard better implements the purpose of deterring defendants from engaging in acts of fraudulent

[17]The *amici's* argument only works if, in fact, the acts of concealment are taken into account in determining whether the victim should have known of the wrongdoing—something the Eighth Circuit failed to do.

concealment. *See Urland v. Merrell-Dow Pharms.*, 822 F.2d 1268, 1281 (3d Cir. 1987) (Becker, J., dissenting). By focusing on the act of deliberate concealment itself, rather than on its ultimate success, the doctrine punishes the intent of the wrongdoer—which is where the doctrine's focus should be. Thus, Chief Judge Posner's analogy to intentional versus negligent torts is apt: just as the law does not permit a defense of contributory negligence to an intentional tort (regardless of the degree of fault attributable to the victim of the tort), so, too, should the law not permit a defense of lack of sufficient diligence when a wrongdoer engages in deliberate concealment. *See Wolin*, 83 F.3d at 852.

The Court should not adopt a standard, such as the "discovery" standard, that creates an incentive for wrongdoers to attempt to conceal their acts. *Cf. Urland*, 822 F.2d at 1281. Rather, the Court must adopt a standard—predicated on the defendant's intent to conceal, and not merely on its degree of success—that will cause wrongdoers to conclude that the costs of engaging in such conduct do, in fact, outweigh the benefits.

C. AOSHPI Prevented the Klehrs from Learning that the Harvestore Silo Was the Source of Their Problems.

Finally, AOSHPI contends that the Klehrs cannot prevail under the doctrine of fraudulent concealment because AOSHPI did not affirmatively conceal the Harvestore's problems—problems the existence of which, paradoxically, AOSHPI continues to deny. AOSHPI attempts to divert the issue from what it has concealed by discussing what it could not have concealed: the fact that the silo did not work as well as promised. *See* Resp. Br. 33-35. This is not a suit in warranty, however, about a product not working as well as expected. This is a case about a pattern of fraud related to the fact that "good Harvestore feed" affirmatively harms cattle. AOSHPI undertook to conceal that fact from the Klehrs and from all other farmers, and it continues to do so by such means as (1) the scratch-and-sniff advertisements which suggest that feed that smells of molasses is good feed, (2) written and oral representations that warm feed is good feed, (3) oral representations by AOSHPI's representatives that the feed coming out of Klehr's silo was good feed and that some mold was to be expected, (4) repairs to the silo

coupled with representations that it was completely resealed, and (5) concealment of negative internal research regarding the failure of the Harvestore silo to exclude oxygen, coupled with publication of misleading "university" research.[18]

CONCLUSION

The Klehrs, and with them farmers throughout this country, have suffered for many years at the hands of AOSHPI. It is only because of the ongoing nature of AOSHPI's criminal fraud that the Klehrs ask this Court to permit their civil RICO claims against AOSHPI to proceed. Whether it be by means of the criminal "last predicate act" rule, a determination that the limitations issues present genuine issues of material fact, or the "actual knowledge" standard applied to affirmative acts of fraudulent concealment, the Klehrs ask that this Court reverse the judgment of the Court of Appeals for the Eighth Circuit and remand this action so that the Klehrs may, at long last, have their day in court.

Respectfully submitted,

Charles A. Bird
Counsel of Record
Bird and Jacobsen
305 Ironwood Square
300 Third Avenue SE
Rochester, Minnesota 55904
(507) 282-1503

Mary R. Vasaly
Michael C. McCarthy
Of Counsel
Maslon Edelman Borman & Brand,
a Professional Limited Liability Partnership
3300 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200

[18]This is precisely the sort of conduct described by Judge Posner's example, in *Martin*, of a plaintiff who, having invested money with the defendant and lost it, is told some "elaborately fraudulent tale," as a result of which the plaintiff loses time in learning of the defendant's wrongdoing. *See* 966 F.2d at 1102; *see also Wood*, 101 U.S. (11 Otto) at 143 (a "trick or contrivance" constitutes fraudulent concealment).

Malcolm McCune
Maddin, Miller & McCune
300 James Robertson
Parkway
5th Floor
Nashville, TN 37201
(615) 254-8756

COUNSEL FOR PETITIONERS